No. 10204

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S CLOSING BRIEF.

JOHN L. WHEELER,
1240 Pacific Mutual Building, Los Angeles,
Attorney for Petitioner.

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PETITIONER'S CLOSING BRIEF.

Statement.

In its Statement (Resp. Br. p. 3), respondent states "Under the contract then drawn up (referred to herein as the old contract) the taxpayer *was entitled*, among other things, to a commission on all renewal premiums on policies written through his agency in an amount that for purposes of this proceeding is stipulated as two and one-half per cent. [R. 55, 59-60.]" (Italics supplied.)

The sense in which the taxpayer was "entitled" to receive a renewal commission of 2½% on all renewal premiums written through his agency in St. Louis must

be unequivocably, stated and clearly understood at the outset. The use of the word "entitled" in connection with that part of the renewal commission represented by 2% of the premium* involves a predetermination of the fundamental issue of this proceeding.

The managerial contract entered into between petitioner and the Prudential Insurance Company on August 4th, 1919 (Pet. Br. pp. 29-37) provided in section 3 that so long as the manager remained in the employ of the company, his compensation would be a commission on premiums *when collected* as specified in that section. It was stipulated between the parties that the manager was entitled to retain personally only 2½% of the premiums set forth in section 3 inasmuch as the balance of the various percentages therein set forth was paid to the agent who wrote the policy. [Stip. 15, R. p. 19.] Petitioner was entitled, under the contract, to retain this commission of 2½% of the premium *only* in the event he collected the premium. *If, for any reason,* the renewal premium (or the first year premium, for that matter), was not collected by the manager during the existence of the contract, the company retained 2% of the premium as a collection fee. (Para. 2 of Sec. 4, Pet. Br. p. 30.)

Similarly, upon termination of the contract, when petitioner could not collect the premium, the company retained 2% of the premium as a collection fee. (Sec. 6, Pet. Br. pp. 31-32.) Likewise, whenever petitioner col-

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*While respondent indicates (Resp. Br. p. 5) that the sums represented by the 2% portion of the renewal commission of 2½% are referred to in its brief as "renewal commissions", such reference is misleading inasmuch as the sums received are in fact comprised of two factors; namely, the 2% of the premiums represented by the collection fee, and the ½% represented by petitioner's renewal interest.

lected the premiums on policies not provided for in section 3 of the contract, he retained 2% of the premium as a collection fee. (Pars. 1, 3, Sec. 4, Pet. Br. p. 30.)

Thus, the 2% of the premium was not retained by the company *only* if petitioner left the managership of the agency, as respondent implies in its statement in its brief, page 3, nor was the retention of the 2% of the premium as a collection fee a forfeiture, as respondent states in its brief, page 4. The retention of the 2% of the premium by the company as a collection fee upon the termination of the contract was only one application of the agreed measure of compensation to which the party making the collection was entitled. This was true whether the contract was terminated or remained in effect. The forfeiture that occurred under the contract was that provided for in sections 7 and 8. (Pet. Br. p. 32.) Under these provisions, in the event of violation of the contract, petitioner would have forfeited the ½% of the premium to which he was "entitled" upon the termination of the contract.

Summary of Argument.

The character of income resulting from the rendering of personal services is determined by the laws of the husband's domicile at the time the services are rendered, and the services for which the petitioner received the sums represented by the 2% of the renewal premiums were rendered in California. The issue is not, as respondent states in its brief, page 6, as to "where the service was rendered", nor is it a factual question. The issue is as to where the services were rendered by which petitioner earned the sums represented by the 2% of

the premium. Services were rendered by petitioner in both St. Louis and California, but the determination to be made is as to whether the sums represented by 2% of the renewal premium were earned in St. Louis by reason of services rendered there, or whether the sums measured by 2% of the renewal premiums were earned through the rendering of services in California. The determination of the Board of Tax Appeals on this question was one of law and is binding on appeal only in the event it was correct.

Respondent's statement that the sums derived from the 2% of the premium are the taxpayer's separate property, even if part of the service for which they were paid was rendered in California, and its assertion that for community property purposes the making of a contract by the husband is an acquisition of property interest, so that income received from the rendering of services is deemed to have been acquired as of the contract date, is not supported by the decisions of this Court or of the California Courts. The controlling decisions are to the contrary. It is settled law under these decisions that the character of income is determined by the law of the husband's domicile and the time the services were rendered, and not by the law of his domicile at the time the contract was signed.

ARGUMENT.

I.

Under the "Domicile at Time of Service" Test of Community Property, the Sums Represented by 2% of the Premiums Are Community Property.

Respondent's statement that

> "There is nothing in the record that indicates any relation between particular California service rendered by the taxpayer in the tax year of 1938 and payment of these commissions. Nor is there any evidence that the company regarded them as compensation for any particular service there rendered. As a matter of fact, the only management contract for the Los Angeles Agency agreeable to the company was the standard new-type contract covering compensation for all service of agency management and that standardized contract was the one signed by the taxpayer. The compensation provided by that contract represented all the company would pay for the service rendered in California." (Resp. Br. p. 8.)

does not accurately reflect the record in this proceeding. All the testimony in the record is to the effect that the petitioner's services as manager of the Los Angeles Agency were the basis for the payment of the sums measured by the 2% of the renewal premiums. Thus, petitioner's letter to Mr. Chace, Vice-President of the Prudential Insurance Company [Ex. D, R. pp. 41-44], the postcript of which sets forth petitioner's understanding with reference to the receipt of these sums, clearly indicates that the receipt of the sums is in connection with the transfer to the Los Angeles Agency and is in fulfillment of the duties as manager in that Agency.

Similarly, the letter of Mr. Chace to petitioner [Ex. E, R. pp. 44-47] clearly indicates that the sums involved herein were to be received in connection with the services of petitioner as manager of the Los Angeles Agency. Mr. Chace's statement [Ex. H, R. pp. 51-53] does not leave any room for doubt on this point. He states [R. p. 52]

> "It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency."

Thus, it is patent that respondent's statement

> "The compensation provided by that contract represented all the company would pay for the service rendered in California." (Resp. Br. p. 8.)

and the similar statement (Resp. Br. p. 13) are directly contrary to the positive understanding of the parties as they have expressed it.

Respondent's statement (Resp. Br. pp. 8, 9) that

> ". . . the taxpayer argues that under the old contract the renewal commissions were in reality paid for collection of the premiums"

is misleading.

Petitioner does not argue, as respondent states (*supra*) that *all* of the sums represented by the renewal commission of 2½% were in reality paid for the collection of premiums under the old contract. Petitioner's position has always been that under the old terms contract, petitioner earned the ½% portion of the renewal premium in the writing of the policy and that the 2% portion of

the renewal premium representing the collection fee was earned at the time, and by the party by whom the collection was made, in the collecting of the renewal premium itself. Petitioner had the right to receive sums represented by the ½% of the renewal premiums upon the termination of the old contract, but he had no right to receive sums represented by the 2% of the renewal premiums unless he collected the premiums, whether the contract was terminated or remained in effect.

When respondent states in its brief, page 9,

> ". . . while the burden of proof is on the taxpayer, he adduced no evidence to show that this collection service on the Missouri policies was of such character as could reasonably represent the true consideration for the renewal commissions."

respondent entirely disregards the provisions of the old contract itself. The contract, of course, was determinative of the rights of the parties and it is obvious, as petitioner demonstrated in his opening brief (pages 9-13), that the parties to the contract agreed that sums represented by 2% of the renewal commission were the consideration for the collection service. No better proof than the agreement of the parties can be adduced, but if further evidence were required, the statement of petitioner in the postscript of the letter setting forth the agreement with reference to his transfer to the Los Angeles Agency clearly indicates his understanding of the sums represented by the 2% of the renewal premiums, when he said

> "I understood I would receive the full renewals same as had I remained here, only the company will bear expense for collecting to the 10th year." [R. pp. 43-44.]

Under the contract, the agreed measure of this expense was the 2% collection fee. (Secs. 4, 6, Pet. Br. pp. 30-32.]

In the light of the express provisions of the old contract, respondent can take little comfort from the fact that the California contract (an entirely new type contract) did not provide for the payment of collection fees, (Resp. Br. p. 9), or that the contracts of other insurance companies did not provide for collection fees and made the receipt of renewal commissions of unspecified amount independent of further service by the agent (Resp. Br. p. 9), or statements with reference to other contracts which are not shown to be identical with or even similar to the contract between these parties. (Resp. Br. pp. 9-10.) Such considerations are patently immaterial.

Nor can respondent find support for its argument in that portion of Mr. Chace's letter to petitioner which is quoted, as follows:

> " 'in other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions.' " (Resp. Br. p. 10.)

This statement must be read in the light of the express provisions of the contract. Business qualified for renewal is comprised of those policies as to which section 3 of the contract is applicable, as has been demonstrated in petitioner's opening brief, pages 9-12, and herein. The renewal commission of 2½% of the premiums provided for in section 3 was comprised of 2% of the premium as a collection fee and ½% of the premium as a renewal interest. While the contract does not spell this out in that detail, it is clear that such is the fact from the

force of paragraph 2 of section 4 of the contract. Clearly, the 2% of the premium on business qualified for renewal commission is earned only when collection is made although the renewal interest of the ½% of the premium was earned in the writing of the policy whether the contract is in effect or is terminated.

Mr. Chace, in making the statement, did no more than designate the measure by which the additional compensation which petitioner was to be paid for his management of the Los Angeles Agency was determined. This particular method of measuring the additional income and the amount that would be received therefrom was selected because, in the words of Mr. Chace,

> "It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency." [Ex. H, R. 52.]

In making the statement that the term "collection fee" is "reserved for designation of pay for service in collection of premiums on which the agent is not entitled to his renewal commissions or deduction by the company from the agent's renewal commission on termination of the agency," (Resp. Br. p. 10.) respondent completely avoids paragraph 2 of section 4 of the contract, as has been previously noted. It is this paragraph that makes it clear beyond doubt that the sums represented by the 2%, by whomever received, represented the fee for the collection service.

Nor do the 1927 amendments to the contract have the significance which respondent would accord them. The

character of the collection fee of 2% of the premiums having been clearly established under the old contract, the company had the right to provide for a conditional waiver of the collection fee in certain instances. This did not change the character of the collection fee or its amount in cases to which section (a) of the amendments relating to terminal commissions (Pet. Br. p. 39) was not applicable.

Respondent's argument that the transfer of the agent amounts to "a withdrawal of the company from the territory" (Resp. Br. p. 12) is patently unfounded and not in accord with the simple fact. The company still operates the St. Louis Agency, for while the petitioner was a valuable man to the company, he was not indispensable to the company's operation in that area. Likewise, respondent's statement that the parties treated the termination and transfer that occurred here as similar to other agency-terminating contingencies without fault and therefore made the renewal commissions payable notwithstanding the transfer (Resp. Br. p. 12), is in direct conflict with the terms of the contract and the actions of the parties.

Paragraph (b) of the 1927 amendments relating to terminal commissions (Pet. Br. p. 40) provides for termination without fault and the full collection fee of 2% of the premium is retained by the company. Paragraph (c) of the 1927 amendments relating to terminal commissions (Pet. Br. p. 40) is the only provision for termination because of the fault of the manager and it would require forfeiture of the ½% of the premium constituting the manager's renewal interest, to which he was entitled upon the writing of the policy. Petitioner's contract was terminated under paragraph (b).

Petitioner realized that under this paragraph he would not receive the sums represented by the 2% collection fee upon the termination of the old contract and his acceptance of a new contract. He therefore entered into an express agreement providing for the payment of the sums represented by this 2% collection fee as additional compensation for his services as manager in the Los Angeles Agency. This is clear from the exchange of letters and from Mr. Chace's direct statement to that effect. The parties never contemplated, nor did they make, the adjustments that would have been required by paragraph (a) of the Amendments of 1927. (Pet. Br. p. 39.)

Respondent then argues (Resp. Br. p. 13) that the fact that the amount of the additional compensation to be received by petitioner was measured by premiums derived from policies in the St. Louis Agency requires the conclusion that the sums thus received were for services rendered in Missouri. This is in direct conflict with the express agreement of the parties and the statement of Mr. Chace. Yet inasmuch as it involves respondent's basic point of approach to the issue here presented, it may be well to give it further consideration.

That respondent's argument on this point is without substance is obvious under the decision of the California Supreme Court in *French v. French,* 17 Cal. (2d) 775, 112 Pac. (2d) 235. In this case, involving an action for divorce, the husband was to receive certain moneys for a period of years as a member of the Fleet Reserve of the United States Navy. The wife claimed a half interest in the "retired pay" to be received in the future by the husband, on the theory that the moneys had been earned during their marriage, while the husband was a member of the United States Navy, and that consequently the

"retired pay" belonged to the community although payment was to continue into the future. The statute involved was the Naval Reserve Act of 1938, Secs. 1, 206, 34 U. S. C. A., Secs. 853, 854e. Under this statute, the husband, as a member of the Fleet Reserve, could not be required to perform more than two months' active duty in the Navy in each four-year period. The only other requirement was that he submit to a physical examination at least once during each four-year period. The "retired pay" which he would receive was based upon the amount he was receiving in active service at the time of his transfer to the Fleet Reserve. It was the theory of the wife that because the services required were in no manner commensurate with the "retired pay" received, such "retired pay" was earned by prior services rather than present services. The theory of the wife and the lower court which awarded her a one-half interest in the "retired pay" was precisely that which respondent urges. The Supreme Court held, however, that inasmuch as the husband was required to perform some service, the "pay" was earned by present services and consequently, after the divorce, would be the separate property of the husband. The lower court was reversed.

It should be noted further that the services in the instant case were commensurate with the additional compensation to be received by petitioner for his services in California [Ex. H, R. 51-52] although the parties for convenience adopted as a measure of the amount to be paid for such services, policies which were in effect in the

St. Louis Agency. The reasons for adopting this method of measurement clearly appears from the facts facing the parties with reference to the two agencies and from Mr. Chace's statement. It is submitted that this decision is decisive of the instant case.

Respondent further argues that the waiver agreement between petitioner and the Prudential Insurance Company with reference to the payment of the sums represented by the 2% of the premiums was subject only to a possible implied condition that the taxpayer remain in the company's employ, and therefore in the event of a wrongful discharge of the petitioner, the company would remain liable for the sums represented by the 2% of the premium. While the agreement with reference to the payment of the sums represented by the 2% of the premium is in fact subject to more than the implied condition that the taxpayer remain in the company's employ, *i. e.,* continued rendering of services by the petitioner in Los Angeles, yet a determination of the question of whether the company would be liable under the terms of the waiver agreement for the payment of further sums represented by the 2% of the premium in the event of wrongful discharge (Resp. Br. pp. 13-15) does not have even a remote bearing upon the fundamental issue as to the character of the income.

That this argument is nothing more than a makeweight is apparent when respondent's conclusion in the remarkable sentence

> "If it be recognized that on a wrongful discharge the taxpayer would be entitled to full payment of the

> renewal commissions under the waiver agreement on the ground that such commissions represent pay for service previously rendered, so also in this proceeding must it be concluded that the renewal commissions received by the taxpayer in California constituted payment for service rendered in Missouri while he was there domiciled." (Resp. Br. pp. 14, 15.)

is examined. In other words, respondent states that if it is admitted that the renewal commission (the sums represented by 2% of the premium which is here involved) was earned through services rendered in Missouri and that respondent would be entitled to receive such commission in the event of his wrongful discharge, then it must be concluded that the services were rendered in Missouri. It is obvious that the conclusion announced is merely a restatement of the matter admitted and the question of wrongful discharge has not the slightest relation to the conclusion stated. The logical process involved is apparent when one considers that if it is originally admitted that the commission was earned through services rendered in California, the conclusion is likewise inescapable that the commission was earned in California.

Respondent's final argument under its Point I is that the issue, where the services were performed for which the sums represented by the 2% of the premium were paid, is essentially one of fact. The only factual question is whether services were rendered in Missouri or California. Obviously, they were rendered in both places. However, the question of whether the sums represented by 2% of the premium were paid for services in Missouri or Cali-

fornia can be resolved only by a determination of petitioner's rights under the various contracts between the company and himself. This is clearly a legal question and was so recognized by the Board of Tax Appeals in the very language of its opinion cited by respondent. (Resp. Br. p. 16.) It might also be observed that there is no conflicting evidence in the record. The facts were stipulated, and none of the facts necessary for a determination of this point was left unresolved. It is a truism that under such circumstances the conclusions of the Board and its finding are reviewable and are binding upon this court only in the event that they are correct.

Respondent did not discuss, nor has it met in its argument, the controlling cases cited in petitioner's brief, page 12, which clearly establish that under the St. Louis Agency contract that existed between petitioner and the Prudential Insurance Company, petitioner had no right, legal or equitable, to sums represented by the 2% of the premiums, either while the contract was in effect or upon its termination. The conclusion is inescapable that such sums could not and did not represent compensation for services rendered in Missouri. Likewise, respondent ignored the unequivocal statement of Mr. Chace with reference to the agreement between the parties with reference to the payment of sums represented by the 2% of the premiums. The agreement of the parties and Mr. Chace's statement demonstrate that such sums were paid for services rendered in California at a time when petitioner was domiciled in California. As such, these sums were income to the community and were properly returned by petitioner and his wife.

II.

Under the Controlling Decisions in California, the Sums Represented by 2% of the Premiums Are Community Property as the Services for Which They Were Paid Were Rendered in California While Petitioner Was Domiciled There.

Respondent states (Resp. Br. p. 17) that none of the decisions cited in petitioner's opening brief presented the issue as to whether it is the property law of the state of the domicile at the time of service or at the time the right to the property was acquired that governed. Petitioner submits that the decisions cited are to the effect that the property law of the state of the domicile at the time services are rendered determines the character of the income. This proposition is so well established, however, that it need not rest on the cases cited if in the opinion of the respondent they are insufficient. In cases coming before this Court and the Courts of California, the proposition has been clearly determined.

Rogan v. Delaney, 110 Fed. (2d) 336 (C. C. A. 9);

Russell v. Langharn, 20 Fed. (2d) 95 (C. C. A. 9);

French v. French, supra;

McBride v. McBride, 11 Cal. App. (2d) 521, 54 Pac. (2d) 480;

Travelers Insurance Co. v. Fancher, 219 Cal. 351, 26 Pac. (2d) 482;

New York Life Insurance Co. v. Bank of Italy, 60 Cal. App. 602, 214 Pac. 61;

Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 Pac. 754;

Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640.

As respondent states, personal property acquired by the husband in a non-community property state while there domiciled remains his separate property when removed to California on his establishing a domicile in that state. The definitive point in petitioner's argument in the instant case, however, is as to whether petitioner acquired the sums represented by 2% of the premiums in Missouri under the contracts executed while petitioner was domiciled in Missouri. Petitioner will not re-examine the provisions of the contracts and the controlling decisions (Pet. Br. p. 12) which clearly establish as a matter of law that under the old contract as amended petitioner had no right, equitable or legal, to the sums represented by 2% of the premiums. In its argument to avoid the effect of the contract and these decisions, respondent urges that inasmuch as the old contract was written in Missouri, in some way petitioner's right to the sums represented by 2% of the premiums had its inception in this contract. Or, if petitioner's rights did not have their inception in the old contract, they had their inception in the agreement under which petitioner came to California to take charge of the Los Angeles Agency, and as this agreement was written while petitioner was domiciled in Missouri, sums earned under this contract were his separate property. At the outset, it should be observed that if petitioner's theory is correct, the sums earned by petitioner under the new terms agency contract also would be petitioner's separate property inasmuch as it was signed prior to the time petitioner was domiciled in California. Respondent has never claimed that these sums were petitioner's separate property, and it would appear that this is a cogent answer to the argument which respondent makes.

The answer, however, rests on more compelling authority. With the exception of cases dealing with the purchase or acquisition of real property, respondent did not cite any authority, with the exception of quotations from McKay's Community Property, Second Edition, in support of its statement that the laws of the husband's domicile at the time of the signing of a contract determine the community or separate character of the results of the contract. Respondent also stated, to strengthen his lack of other authority, that petitioner concedes that the doctrine of inchoate rights is well established in California. Petitioner stated that the doctrine of inchoate rights was well established (Pet. Br. p. 20), relying upon general statements in some cases. In the law of community property of the State of California, with the exception of early cases pertaining to the purchase of real property and involving the doctrine of equitable conversion, it is well settled that the doctrine of inchoate rights does not apply. The Courts of California and this Court have held that the status of the parties at the time of the creation of contractual rights was not decisive but that the status of the parties at the time of payment of consideration or performance under the contract is the controlling factor. Thus, in *Rogan v. Delaney, supra,* a case involving the purchase of corporate stock, this Court did not accord any weight to the date upon which the contract for the purchase of the stock was entered into in determining the community character of the rights acquired in the stock. The date of the payment of the consideration for the stock

was the determining factor. This rule was likewise applied in a case involving community and separate rights in real property acquired partly with separate funds and partly with community funds. (*Russell v. Langharn, supra.*) In this case, commensurate and separate interests also were apportioned in the property commensurate with their relative contributions to the purchase price.*

In the cases involving insurance contracts and the payment of premiums under such contracts, the California Courts have consistently held that the community or separate rights in the insurance fund were not to be determined by the status of the parties at the time the contract was entered into, but community or separate interests in the insurance fund have been apportioned to the community or separate interest commensurate with the contributions made from community or separate funds.

McBride v. McBride, supra;

New York Life Insurance Co. v. Bank of Italy, supra;

Modern Woodmen of America v. Gray, supra;

Travelers Insurance Co. v. Fancher, supra.

In *New York Life Insurance Co. v. Bank of Italy, supra,* the early California case of *In re Webb,* Myr. Prob. 93, was cited with approval. This case held that where the decedent had paid one-half of the premium while he was single and subsequently two-thirds while he was mar-

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*As to the application of a similar rule of law in the State of Washington, see *In re Kuhn's Estate,* 132 Wash. 678, 233 Pac. 293.

ried, the proceeds of the policy would be divided as one-half separate property and two-thirds community.

Respondent attempts to distinguish the decision in *Modern Woodmen of America v. Gray, supra,* on the basis that insurance contracts are peculiar in that each year's premium payment is a renewal of the contract. This argument was urged upon the Court in *McBride v. McBride, supra; Modern Woodmen of America v. Gray, supra,* and *New York Life Insurance Co. v. Bank of Italy, supra,* and the Court in each case rejected it, holding that the contract of insurance was entire. Respondent also seeks to distinguish the rule of these cases by stating that it is doctrine peculiar to insurance cases. In view of the decisions of this Court and of the California Supreme Court in *French v. French, supra,* and *Vieux v. Vieux, supra,* such a position cannot be maintained.

In the light of the uniform holding in all these cases that the results of the contract will be apportioned upon a basis commensurate with the respective contribution of separate or community property to the fulfillment of the contract, respondent's argument (Resp. Br. p. 27) that the community has only a right of reimbursement secured through filing a claim against the separate property cannot be sustained. This doctrine may be employed in other states but it is not the law in California and consequently is not controlling. This argument was examined in *New York Life Insurance Co. v. Bank of Italy, supra,* and it was expressly held that it is not in accord with California law on the subject.

Were there no other authorities, *French v. French, supra,* would be decisive. This case, as has been stated earlier, was an action for divorce in which the wife claimed a community interest in future payments of "retired pay" that her husband would receive after divorce. The "retired pay" was received under the provisions of the Naval Reserve Act of 1938, Secs. 1, 206, 34 U. S. C. A., Secs. 853, 854e. This statute was contractual in nature and if the doctrine of the inception of contractual rights which respondent urges was the law in California, the wife's claim necessarily would have been sustained. The court held, however, that the "retired pay" was to be received for services to be rendered after the husband's divorce and consequently would be his separate property.

Respondent finally argues that if part of the services were rendered in California and part of the services were rendered in Missouri, the income would be the separate income of the petitioner. Petitioner has recognized that if the sums attributable to the service in Missouri could be segregated, such sums would be the petitioner's separate property. Thus, petitioner conceded that the ½% of the premium to which petitioner was entitled from the writing of the policies in Missouri was his separate property. However, in the event that the income attributable to the services rendered in the two states could not be segregated, it is well settled under California decisions that the burden would be upon the Commissioner to demonstrate the separate character of the income.

> *Porter v. Nelson,* 42 Cal. App. (2d) 750, 109 Pac. (2d) 996.

Factually, however, it is clear that all of the services for which petitioner received the sums representing 2% of the premiums were rendered by him in the supervision of the Los Angeles Agency while petitioner was domiciled in California. It is submitted, therefore, that the sums representing 2% of the premium paid to petitioner for services rendered in California while petitioner was domiciled there were the income of the community although the agreement under which these services were performed was entered into in a non-community property state.

Conclusion.

The decision of the Board of Tax Appeals should be reversed.

Respectfully submitted,

JOHN L. WHEELER,

Attorney for Petitioner.